No. 7003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLARENCE W. MORRIS,

Appellant,

vs.

HARRY L. HUSSMAN and CAROLINE HUSSMAN,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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Table of Authorities Cited

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, the Honorable William H. Sawtelle, and the Honorable Francis A. Garrecht, Circuit Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Your petitioner, defendant and appellant, herein respectfully presents his petition for a rehearing of the above entitled cause upon the following grounds:

I.

The decision is contrary to the specific provisions of the statute of the State of California providing for the rights and liabilities of sureties.

II.

The decision rendered by this Honorable Court stands alone, and without precedent.

III.

The decision overrules all previous decisions.

The Honorable Court stated in its opinion:

> "The answer to this proposition is that the appellant had no interest in the lien created by law for the benefit of Barrett & Hilp and no right of subrogation thereto. Consequently, the lack of knowledge or consent of the guarantor to the assignment or surrender of the lien is without significance."

This injects into the law a limitation on the protection of a surety that is not contemplated by the statute nor by the decisions of the Supreme Court of this State and after all, the case before this Court involves an interpretation of a California statute and comes here solely because of the diversity of citizenship of the parties litigant.

Section 2849, Civil Code of the State of California, provides:

> "A surety is entitled to the benefit of *every security for the performance of the principal obligation held by the creditor, * * * or acquired by him afterwards, whether the surety was aware of the security or not.*"
>
> 2849 C. C.

This language is all inclusive and allows of no limitations whatsoever. Consequently, if the security is provided by law or otherwise, the surety is entitled to all of the benefit thereof.

Indeed the Courts of California in construing this section have clearly given it such a construction. We quote from *County of Glenn v. Jones,* 146 Cal. 518, at 520:

> "He the creditor, must withhold nothing, conceal nothing, *release nothing* which will possibly affect the surety, and must not do any act injurious to the surety or inconsistent with his rights."

If the foregoing case correctly states the law, and we believe it does, then the decision in the instant case should be reviewed, because it cannot be contended that if appellant had taken an assignment from Barrett & Hilp, that he would not have been entitled to foreclose the mechanics lien against appellees.

The California cases supporting this contention are cited in appellant's brief, and we earnestly request this Honorable Court to examine such authorities or the excerpts therefrom because we have been unable to find the slightest modification of the rule as laid down by the code section cited and in the various decisions interpreting the same.

Indeed in order to find support for the decision in this case, it would be necessary to add the following language to Section 2859 of the Civil Code of the State of California, i. e., *"Except security provided by the law."* This apparently was never contemplated by the State Legislature.

We have been unable to find any case in California or elsewhere indicating that security given by law does not inure to the benefit of the surety.

We venture to again call the attention of the Court to the case from a sister state cited in our opening brief where the facts and principles are identical. A railroad surrendered its carrier lien for transportation of building material, by delivery of the material without payment of freight. *It could not enforce its claim for unpaid freight against the contractors' surety, since if it had not surrendered its lien, the surety could have had the benefit of subrogation.*

Kansas City v. Southern Surety, 203 Mo. A. 148;

Kingray on Suretyship and Guaranty, Second Edition, 157.

May we also call the attention of the Court to a case on this point rendered by the District Court of this division, which we failed to cite in our opening brief, *T. H. Martin & Co. v. Pickering Lumber Co.,* 2 Fed. Sup. at page 606, wherein the Honorable Judge Kerrigan in his opinion said, "It is the rule in California that a surety who pays the debt of his principal is subrogated to all the *rights* and *priorities* of the creditor."

See also:

Draffen v. U. S. Fid. & Guar. Co., 68 Cal. App. Dec. 1224;

Granger v. Harper, 68 Cal. App. Dec. 704.

We respectfully submit that if the decision of this Honorable Court is allowed to stand, every surety and/or bonding company in the State of California guaranteeing payment of charges for labor and/or material in building contracts will be deprived of the

protection upon which they have relied for more than sixty years.

Therefore, we earnestly urge this Honorable Court to reconsider the decision rendered in this case.

Dated, San Francisco,
September 1, 1933.

JESSE A. MUELLER,
HAROLD J. ABRAHAM,
CHAS. N. DOUGLAS,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We, the undersigned, counsel for the appellant and petitioner herein, do hereby certify that in our opinion the within petition for a rehearing is well founded in law and that it is not interposed for delay.

Dated, San Francisco,
September 1, 1933.

JESSE A. MUELLER,
HAROLD J. ABRAHAM,
CHAS. N. DOUGLAS,
Attorneys for Appellant and Petitioner.